Mailed: February 19, 2004
Hearing: Paper No. 19
October 29, 2003 PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Amvescap PLC

_____

Serial No. 76214007

_____

Lesley S. Craig and Ian L. Saffer of Townsend and Townsend and Crew LLP for Amvescap PLC.

Rebecca Gilbert, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

_____

Before Hairston, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Amvescap PLC has filed a trademark application to register the mark INVESCO FIELD AT MILE HIGH for “providing facilities for sporting events, namely football games and

soccer matches; providing facilities for entertainment events, namely music concerts."[1]

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark MILE HIGH STADIUM previously registered for "providing stadium facilities for sports and recreational activities,"[2] as to be likely to cause confusion, mistake or deception, if applicant's mark is used in connection with the identified services.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We reverse the refusal to register.

Preliminarily, we must discuss an evidentiary matter. The Examining Attorney has objected to the portion of applicant's brief relating to the "history" surrounding

[1] Serial No. 76214007, filed February 21, 2001, based on a bona fide intention to use the mark in commerce. The word "FIELD" has been disclaimed apart from the mark as shown. The application originally included goods in a number of classes, but the classes to which no objection were raised, were subsequently divided out of the application so that they could proceed to publication without waiting for disposition of the present appeal.

[2] Registration No. 2,291,174 issued November 9, 1999. The word "STADIUM" is disclaimed apart from the mark as shown.

MILE HIGH STADIUM and INVESCO FIELD AT MILE HIGH. The material is derived from websites and applicant included the website addresses. However, the Examining Attorney has objected thereto contending that the material may not be considered in the absence of actual printouts from the websites. We note that applicant included this same historical information, along with the website addresses, in its request for reconsideration and the Examining Attorney made no objection at that time. Under the circumstances, we consider the Examining Attorney to have waived any objections.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. duPont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that the "[f]undamental inquiry mandated by Section 2(d) goes to the cumulative effects of differences in the essential characteristics of the goods and the differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the services, applicant does not dispute that its services, i.e., "providing facilities for

sporting events, namely football games and soccer matches; providing facilities for entertainment events, namely music concerts,"[3] are essentially identical to the services in the cited registration, i.e., "providing stadium facilities for sports and recreational activities." Thus, our inquiry in this case focuses on the marks of applicant and registrant.

With respect to the marks, the Examining Attorney maintains that:

> The registered mark consists of the term MILE HIGH in connection with the generic term for stadium services, STADIUM. The applicant has merely added the name of the field to the registered stadium name and omitted the generic term for the services. It is well settled that the mere addition of a term to a registered mark is not sufficient to overcome a likelihood of confusion under Section 2(d). [citations omitted]. The impression of the applicant's mark when used in connection with its services is INVESCO FIELD AT MILE HIGH STADIUM services, which has a highly similar commercial impression to MILE HIGH STADIUM stadium services. Merely adding the field name and omitting a generic word is insufficient to obviate the likelihood of confusion.
> (Brief, page 5.)

Further, while the Examining Attorney acknowledges that Denver is located approximately a mile above sea level, she disagrees with applicant that users of applicant's services would view the "AT MILE HIGH" portion

[3] Although the application was filed as an intent-to-use application, applicant states that it commenced use of its mark in 2001.

of applicant's mark as suggesting that the stadium is located a mile above sea level.

In support of the 2(d) refusal, the Examining Attorney made of record excerpts from the NEXIS database. The excerpts fall into two categories, the first set of which contain references to "Invesco Field at Mile High Stadium." According to the Examining Attorney, these are references to applicant's services, and they demonstrate the manner in which applicant's mark is perceived. The following are representative examples:

> Yes, Graham rallied Washington from a 10-point deficit to a 17-10 upset of Denver in the wintry mix yesterday at ***Invesco Field at Mile High Stadium***.
> (The Washington Times, November 19, 2001);
>
> CoCal has done work at the U.S. Olympic Complex, Palomino Park, Rock Creek Ranch, Interlocken, ***Invesco Field at Mile High Stadium***, and Mountain View Corporate Center.
> (Northern Colorado Business Report, November 2, 2001);
>
> In Colorado, voters approved the sale of $260 million of sales tax revenue bonds in 1998 to finance construction of ***Invesco Field at Mile High Stadium*** for football's Denver Broncos.
> (The Bond Buyer, October 9, 2001); and
>
> As Denver owner Pat Bowlen took yet another tour of his new ***Invesco Field at Mile High Stadium***, he knew something was missing.
> (The Houston Chronicle, September 16, 2001).

The second set of excerpts assertedly contain references to registrant's services as simply "Mile High". According to the Examining Attorney, because these excerpts show that persons commonly refer to registrant's services as simply "Mile High", when MILE HIGH is used in applicant's mark, it will be perceived as referring to MILE HIGH STADIUM. The following are representative examples:

> Elway has not lost a home game since January 1997. He has won 17 in a row at ***Mile High*** since then.
> (The Dallas Morning News, January 17, 1999);
>
> For 16 of the past 17 games at ***Mile High***, Richard Stewart, Broncos media relations assistant, has shaved his head the morning before each home game.
> (The Denver Post, December 27, 1977); and
>
> 96: Head coaches and assistant coaches for Broncos who prowled the sidelines at ***Mile High*** since 1960.
> (Denver Rocky Mountain News, December 23, 2000).

Applicant, in urging reversal of the refusal to register, argues that the marks differ significantly in sound, appearance and commercial impression; that in comparing the marks the Examining Attorney has improperly dissected the marks; that the common element MILE HIGH is a weak term such that the cited mark is entitled to a limited scope of protection;, and that the history surrounding

registrant's services and applicant's services demonstrates that there is no likelihood of confusion.

Applicant submitted a number of exhibits in support of its position. Specifically, applicant submitted Denver "Yellow Pages" listings of businesses and organizations with "Mile High" in their names; the results of a GOOGLE search of businesses, organizations, and events with "Mile High" in their names; printouts of the websites of businesses with "Mile High" in their names; and copies of third-party registrations for marks which include the phrase "MILE HIGH."

The test for confusing similarity is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give

more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Although the respective marks have the element MILE HIGH in common, we agree with the applicant that INVESCO FIELD AT MILE HIGH and MILE HIGH STADIUM convey different commercial impressions. We find the Examining Attorney's analysis of the marks to be far too formulaic. This analysis ignores the significance of the term INVESCO in applicant's mark and the fact that the phrase MILE HIGH has geographic significance as used in connection with applicant's and registrant's services.

Because of the highly descriptive if not generic nature of the word STADIUM, users of registrant's services will look to MILE HIGH as the source-identifying component of registrant's mark. They are also likely to use just MILE HIGH when calling or referring to the place where registrant's services are provided, as it is this term they will note and remember. Indeed, the evidence submitted by the Examining Attorney demonstrates that the place where registrant's services have been provided has been referred to as just MILE HIGH. We note, at this point, that we refer to MILE HIGH and MILE HIGH STADIUM as the place where

registrant's services have been provided rather than are provided. This is because it is abundantly clear from the record that that particular stadium no longer exists, the significance of which we discuss, infra.

The applicant's mark INVESCO FIELD AT MILE HIGH contains the highly descriptive, if not generic word FIELD, in addition to MILE HIGH, but because the mark begins with the term INVESCO, it is this term that is the more dominant portion of applicant's mark. It is often the first part of a mark that is most likely to be impressed upon the mind of a purchaser and remembered. See Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988); and Mine Safety Appliances Co. v. Management Science America, Inc., 212 USPQ 105, 108 (TTAB 1987). Moreover, because consumers have a propensity to shorten names with which they have become familiar, many are likely to use INVESCO FIELD to refer to applicant's services.

When the marks are compared in their entireties, giving appropriate weight to the dominant portions of both marks, they differ in sound, appearance, connotation and overall commercial impression.

In reaching this conclusion, we acknowledge that the phrase MILE HIGH is present in both applicant's and registrant's marks, and indeed is the dominant portion of

registrant's mark. However, MILE HIGH is not an arbitrary term. Rather, the phrase has a geographic significance because Denver's elevation has led to it being known as the "Mile High City". The evidence submitted by applicant shows that there are many businesses, organizations, and events located in the Denver area with "Mile High" in their names. Thus, the inclusion in each mark of this phrase is an insufficient basis upon which to base a finding of likelihood of confusion, because Denver area consumers can differentiate one "Mile High" facility from another.

Finally, in reaching our conclusion, we cannot overlook the fact that MILE HIGH STADIUM itself has been demolished; a fact that users of applicant's facility are likely to be aware of. Moreover, as the material made of record by applicant shows, the construction/naming of the new stadium INVESCO FIELD AT MILE HIGH has been the subject of numerous articles in the Denver press and a good deal of controversy. In fact, the record reveals that prospective Denver area attendees of outdoor sporting or entertainment events would be well aware that the facility where registrant's services are offered is different from the now demolished facility where registrant's services were previously provided. Likewise, they would be well aware that applicant's facility includes the term MILE HIGH in

its name as a method of paying homage to the former facility of registrant. The duPont factors include a catch-all factor of "[a]ny other established fact probative of the effect of use." The circumstances under which applicant obtained the naming rights for a new stadium built adjacent to a former stadium, and adopted the dominant portion of the old stadium's name is such a factor in this case. Any likelihood of confusion is de minimis.

Decision: The refusal to register under Section 2(d) of the Trademark Act is reversed.